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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 J. HINTON,  
12 CDCR #T-85879,

13 Plaintiff,

14  
15 vs.  
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17 BENNETT; BOYER;  
18 ROBERTS; ESTES,

19 Defendants.  
20  
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Civil No. 10-0640 IEG (JMA)

**ORDER:**

**(1) DISMISSING CIVIL ACTION  
WITHOUT PREJUDICE  
FOR FAILING TO PAY  
FILING FEE OR MOVE TO  
PROCEED *IN FORMA PAUPERIS***

**(2) DENYING MOTION TO  
APPOINT COUNSEL; AND**

**(3) DISMISSING CIVIL ACTION AS  
DUPLICATIVE PURSUANT TO 28  
U.S.C. § 1915A(b)(1)**

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24 On March 24, 2010, J. Hinton ("Plaintiff"), a state inmate currently incarcerated at  
25 Folsom State Prison located in Represa, California submitted a civil action pursuant to 42 U.S.C.  
26 § 1983.

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I.

**Failure to Pay Filing Fee or Request IFP Status**

All parties instituting any civil action, suit or proceeding in any district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay this filing fee only if the party is granted leave to proceed *in forma pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).

Plaintiff has not prepaid the \$350 filing fee required to commence a civil action, nor has he submitted a Motion to Proceed IFP. Therefore, the case must be dismissed pursuant to 28 U.S.C. § 1914(a). *Id.*

II.

**MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 2]**

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.' Neither of these issues is dispositive and both must be viewed together before reaching a decision." *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff's request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

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### III.

#### SUA SPONTE SCREENING PURSUANT TO 28 U.S.C. § 1915A(b)

The Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915A, obligates the Court to review complaints filed by anyone “incarcerated or detained in any facility who is accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing” and regardless of whether the prisoner prepays filing fees or moves to proceed IFP. *See* 28 U.S.C. § 1915A(a), (c). The Court must sua sponte dismiss prisoner complaints, or any portions thereof, which are frivolous, malicious, or fail to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(b); *Resnick v. Hayes*, 213 F.3d 443, 446-47 (9th Cir. 2000).

Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

Plaintiff’s instant Complaint is subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915A(b)(1) because it appears to be duplicative of a case Plaintiff has already litigated. Plaintiff’s Complaint contains identical claims that are found in *Hinton v. Unknown*, S.D. Cal. Civil Case No. 08cv1258 IEG (CAB). A court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.” *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

A prisoner’s complaint is considered frivolous under 28 U.S.C. § 1915A(b)(1) if it “merely repeats pending or previously litigated claims.” *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (construing former 28 U.S.C. § 1915(d)) (citations and internal quotations omitted). Because Plaintiff has already litigated the same claims presented in the instant action in *Hinton v. Unknown*, S.D. Cal. Civil Case No. 08cv1258 IEG (CAB), the Court

1 hereby **DISMISSES** Civil Case No. 10cv0640 IEG (JMA) pursuant to 28 U.S.C. § 1915A(b)(1).  
2 *See Cato*, 70 F.3d at 1105 n.2; *Resnick*, 213 F.3d at 446 n.1.

3 **III.**

4 **CONCLUSION AND ORDER**


5 For the reasons set forth above, the Court hereby:

- 6 (1) **DISMISSES** this action sua sponte without prejudice for failing to pay the \$350  
7 filing fee or file a Motion to Proceed IFP pursuant to 28 U.S.C. §§ 1914(a) and 1915(a);  
8 (2) **DENIES** Plaintiff's Motion for Appointment of Counsel [Doc. No. 2]; and  
9 (3) **DISMISSES** Plaintiff's Complaint as frivolous pursuant to 28 U.S.C.  
10 § 1915A(b)(1).

11 The Clerk shall close the file.

12 **IT IS SO ORDERED.**

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14 **DATED: May 5, 2010**

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16 **IRMA E. GONZALEZ** Chief Judge  
17 **United States District Court**